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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1443

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,

Appellants,

vs.

ELLENMAE CROW, individually, and on behalf of herself and all others similarly situated,

Appellees.

Petition for Writ of Certiorari to Court of Appeals for the Ninth Circuit

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Appellants,

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ELLENMAE CROW, individually, and on behalf of herself and all others similarly situated,

Appellees.

Petition for Writ of Certiorari to Court of Appeals for the Ninth Circuit

The State of California, Department of Human Resources Development, prays that a writ of certiorari issue to review the judgment of the district court (Northern District, California) entered in the above case on October 12, 1970, and currently before the Ninth Circuit Court of Appeals.

OPINION BELOW

The opinion of the United States District Court of the Northern District of the State of California is reported at 325 F.Supp. 1314 (N.D.Cal. 1970) and is appended to this petition as Appendix A.

JURISDICTION

This suit was brought on behalf of Ellenmae Crow and all others similarly situated for injunctive and declaratory

relief under 42 U.S.C. § 1983 and 28 U.S.C. § 1331, § 1343, § 1346, § 2201-02. Jurisdiction was further invoked under the Fourteenth Amendment to the U.S. Constitution and under 42 U.S.C. § 503(a)(1) and (3).

Following judgment by the District Court, filed October 12, 1970, notice of appeal to the Ninth Circuit was filed on October 30, 1970, and the record from the District Court was transmitted to the Ninth Circuit Court on January 11, 1971. The case has been briefed by all parties, but the matter has not yet been set for oral argument.

Petitioner invokes the jurisdiction of this court under 28 U.S.C. § 1254(1) and § 2101(e). The case is of such imperative public importance as to justify the deviation from normal appellate processes and require immediate settlement in this court.

QUESTIONS PRESENTED

1. Does a procedure which permits the State to rule on a weekly claim for unemployment insurance benefits and immediately enforce said ruling after giving a claimant an opportunity to present evidence and rebut unfavorable information, violate due process?

2. Does the statute described in question 1 violate the provisions of the Social Security Act which require the State to adopt a plan reasonably calculated to insure payments when due?

STATUTES INVOLVED

Upon receipt of information relating to § 1257(b) of the California Unemployment Insurance Code, the State, after gathering and evaluating information, either grants or denies benefits for the particular weekly claim in question. If the claim is denied, a penalty may be imposed pursuant to § 1260(b). The pertinent portion of § 1257 reads,

"An individual is also disqualified for unemployment compensation benefits if: . . . (b) He, without good cause, refused to accept suitable employment when offered to him, or failed to apply for suitable employment when notified by a public employment office."

The pertinent portion of § 1260 reads as follows:

"(b) An individual disqualified under subdivision (b) of section 1257, under a determination transmitted to him by the Department, is ineligible to receive unemployment compensation benefits for not less than two nor more than ten consecutive weeks beginning with: (1) the week in which the cause of his disqualification occurs, if he registers for work in that week. (2) The week subsequent to the occurrence of the cause of his disqualification in which he first registers for work, if he does not register for work in the week in which the cause of his disqualification occurs."

The text of 42 U.S.C. § 503 is attached as Appendix B.

STATEMENT OF THE CASE

Appellee Ellenmae Crow and the class she represents are California citizens who (1) have claimed or will claim unemployment insurance benefits, (2) have been initially determined eligible for benefits, (3) have made weekly claims for benefits following the initial determination of eligibility and (4) have been denied benefits for a particular week after a determination made at a weekly (or bimonthly) interview with Department personnel.

Mrs. Crow was originally determined to be eligible for unemployment insurance compensation benefits on January 24, 1970. During the succeeding weeks, she applied for and was granted benefits on a week to week basis in accordance with the relevant statute. On May 18, 1970, however, she reported to the Unemployment Insurance office and volun-

tarily offered facts which, in the opinion of the eligibility claims interviewer, indicated she had precluded a valid offer of work during the prior week. On this basis she was declared ineligible for benefits for the prior week. This determination was separately confirmed in an interview between Mrs. Crow and the manager of the office. Mrs. Crow was given a full opportunity to explain the circumstances of the work offer and to rebut inferences and evidence of ineligibility, and it was only after the matter was discussed at some length that the decision was made to deny her benefits.

Mrs. Crow appealed the ruling to a referee and following a hearing the referee decided that although it was a close question, the facts did not appear to warrant an inference that Mrs. Crow had refused an offer of work. The referee, therefore, held her eligible for benefits.

While Mrs. Crow's administrative appeal was pending, she brought this action for injunctive and declaratory relief alleging that the Department's procedure in denying her benefits at the weekly claims interview without a prior hearing was unconstitutional. The district court granted Mrs. Crow's motion for summary judgment, ruling that the instant case was essentially indistinguishable from the holding in *Goldberg v. Kelly*, 397 U.S. 254 (1970). Accordingly, the Department was permanently enjoined from enforcing California Unemployment Insurance Code, §§ 1257(b) and 1260(b) in such a way as to result in a denial of benefits "prior to a hearing consonant with the principles of *Goldberg v. Kelly*...."

WHY THE WRIT SHOULD BE GRANTED

1. This Case Justifies Deviation from Normal Appellate Processes

For the reasons set forth in our Motion to Expedite Consideration of Petition for Certiorari, etc., (attached hereto as Appendix C), we believe that it is approriate for this

court to grant the writ prior to judgment by the Ninth Circuit Court of Appeals. The issue involved is one which has enormous fiscal and administrative implications for virtually all of the states.

2. There Is Confusion as to the Scope of This Court's Decision in Java

In the case of *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971), this court ruled that unemployment insurance benefits which are administratively allowed cannot be withheld without a prior hearing merely because an employer's appeal from that ruling is pending. It declared that termination without such a hearing would violate the mandate of the Social Security Act that the State plan be reasonably calculated to insure full payment when due. While the *Java* case was pending before this court and before the opinion issued, a single judge in the District Court for the Northern District of California decided the instant case. The district court's decision, however, was based on grounds other than those used as the basis for the decision of this court in *Java*. The lower court in *Crow* decided the case on constitutional grounds rather than on the pure statutory basis which formed the holding in *Java*.

The procedures struck down here were found valid in the case of *Torres v. New York Department of Labor*, 333 F.Supp. 341 (S.D.N.Y. 1971), affirmed, ... U.S. ..... (Feb. 23, 1972). In *Torres*, the situation of the plaintiff Dinger was virtually identical to that of Mrs. Crow. The District Court in *Torres* stated,

> "Plaintiff Dinger, laid off by his employer due to slack business, was originally found eligible for benefits. Under New York administrative regulations, a claimant must report to an insurance office once a week and certify that he is ready and willing to work.

Department of Labor Field Operations Manual §§ 5030-5042. After receiving ten benefit payments, Dinger was interviewed at an insurance office about his availability for work. On the basis of information Dinger supplied in response to questions, and on the basis of newspaper listings of available jobs, the interviewer determined that Dinger was ineligible to continue to receive benefits because he had not demonstrated 'an active, realistic and diligent search for work.' The benefits were suspended on the basis of new factual circumstances which could not have been considered at the original eligibility interview. The *Java* decision is therefore irrelevant to plaintiff Dinger: not only was the eligibility redetermination based on new facts, but the plaintiff supplied the insurance office with those very facts at an administrative interview. This administrative procedure for redetermining that benefits were not 'due' fully comports with the requirement of 42 U.S.C. § 503(a)(1)(1970)." 333 F.Supp. at 344.

Lastly, in *Burney v. Indiana Employment Security Division,* (now pending before this court, No. 71 1119), a three-judge district court invalidated the Indiana procedures, not on the constitutional grounds used by the *Crow* court, but on the purely statutory ground which was the gravamen of this court's decision in *Java.*

We have then a certain amount of confusion and conflict. The *Crow* court struck down the procedures on constitutional grounds. The *Burney* court also invalidated the procedures, but on statutory grounds, following *Java.* On the other hand, in the only case where *this* court examined the procedures in question (*Torres*), the procedures were sustained as consistent with the Social Security Act. While this court's affirmance of *Torres* should technically settle the matter, confusion persists and further clarification by this court is needed.

3. Most Jurisdictions Employ a Procedure Similar to That Involved Here

In the *Java* case, we pointed out that forty-eight jurisdictions other than California use a procedure virtually identical to the California Unemployment Insurance Code section involved in that case. Similarly in this case, we know of no jurisdictions which do not follow the procedures utilized by the Department in this case. The exigencies of time have precluded us from examining all of the statutes of all of the states. However, a sampling of the states should be sufficient to illustrate the point. See, e.g., Alabama Code of 1958, Title 26, Chapter 4, section 215; Alaska Statutes of 1962, Title 23, Chapter 20, section 23.20.340(d) and (g); Arizona Revised Statutes of 1956, Title 23, Chapter 4, section 23-776(a); Arkansas Statutes of 1947, section 81-1106 (c); Colorado Revised Statutes of 1963, section 82-4-8(2)(b) (3)(i); District of Columbia Unemployment Compensation Act, section 46-311(b) (Public Act 386, 74th Congress, as amended by public law 87-424). Indiana Code of 1971, section 22-4-17-2; New York Labor Law, section 597 and 598 and 620 (McKinney's Consolidated Laws, Chapter 31 (1965)).

4. The Fiscal and Administrative Impact Is Substantial

It is clear that a decision on the issues presented in *Burney* and *Crow* will have an impact of major proportions not only in California and Indiana but in every state and the District of Columbia.

In California alone for 1969, some 116,000 claimants per year were disqualified from receiving benefits for one or more weeks after being once held eligible. (Affidavit of Nicolo Pino, R. 110 at 111.) Even if an adverse decision in this matter does not encourage the filing of additional appeals, the cost of paying benefits to claimants *whose disqualification is subsequently upheld* would exceed $16,500,000

per year in California alone. (R. 112.) There is some doubt as to whether benefits paid under these circumstances may legally be recovered from the claimant;[1] if not, this entire burden must be borne by employers as an additional unemployment insurance tax obligation. Even if such benefits may, from a legal point of view, be recoverable, as a practical matter some $5.5 million would be unrecoverable due to the financial inability of the claimant to respond with restitution. (R. 112.)

More important, it is naive not to recognize the effect of such a decision on the volume of administrative appeals. To enforce a disqualification immediately when no appeal is filed but to pay benefits pending a full adversary hearing is obviously to encourage the filing of appeals, particularly where the benefits so paid may never be repaid. If all 116,000 claimants filed requests for administrative hearings, the cost of paying benefits to those claimants who are subsequently held ineligible would be almost $46 million per year. (Id. p. 113.)

This court should also be mindful of the administrative cost of providing an additional 110,000 hearings per year. In California for the year 1971, 72,042 referee cases and 10,748 Appeals Board cases were processed at a cost of $8,818,940. Clearly, an additional 110,000 referee appeals would generate over 10,000 further appeals to the Appeals Board at a total cost of over $10 million.

Since California processes and pays about 15% of the nation's unemployment insurance claims[2] it is apparent that

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1. This question is currently being litigated in California. *Gilles v. Cal. Dept. HRD*, Sacramento County Sup. Ct., #220,000. See Cal. Unemp. Ins. Code § 1375.

2. *Handbook of Unemployment Insurance Financial Data*, 1938-1970 (1971), U.S. Dept. of Labor, Manpower Administration.

the maximum total impact to State unemployment insurance programs in the United States is in excess of $310,000,000 per year for benefits and some $67 million in administrative costs.

5. The Decision Below Is Erroneous

A. CALIFORNIA PROCEDURES DO NOT VIOLATE THE SOCIAL SECURITY ACT'S REQUIREMENT THAT PAYMENTS BE MADE WHEN DUE.[3]

The Social Security Act (42 U.S.C. § 503(a)(1)) requires that a State plan for unemployment insurance be reasonably calculated to insure full payment when due. This court, in *Java*, ruled that payments are due when benefits have first been administratively allowed "as a result of a hearing of which both parties have notice and are permitted to present their respective positions. . . ." 402 U.S. at 133.

In the instant case, the claimant was initially declared eligible following administrative procedures which this court approved in *Java*. Payments therefore became due. But they became due only for a limited period. For the claims which Mrs. Crow filed during the ensuing weeks, payments were not automatically due. She was required to establish her eligibility each week, to show that she had looked for work, that she had not refused work, etc. So long as she sustained her burden each week, there was no need for the interviewer to contact other parties and on each such occasion payments became "due". But once an issue did arise, procedures similar to those in *Java* were invoked to resolve the matter.

After qualifying for and receiving benefits for a number of weeks, Mrs. Crow arrived at the unemployment insurance office on May 18, 1970 to make yet another weekly claim. As

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3. In the instant case, the district court did not decide whether or not the Department's procedures violated the Social Security Act. The discussion of the Act is included here only because it was dispositive in *Java*.

noted above, procedures virtually identical to those in *Java* were employed. On this occasion, however, Mrs. Crow supplied information which, in the opinion of the interviewer, disqualified her for benefits. In terms of the "when due" requirement of the statute, the action of the Department can be seen in one of two ways:

1. If Mrs. Crow's weekly claims are seen as separate and discrete, then when the Department denied her claim on May 18, 1970, it could have done so without affording her a full hearing. Mrs. Crow could have simply appealed to a referee at which time she would have received her hearing. Nor would the failure to afford her a hearing prior to denial of her claim have violated *Java*. The latter case states only that payments cannot be withheld after benefits have been "administratively *allowed*" (emphasis added), not when they have been administratively denied.

But it is not necessary for the Department to rely on this analysis. The fact is that whether it was compelled to or not, the Department did afford Mrs. Crow a complete due process hearing at the time it denied her May 18, 1970 claim. She had a full opportunity to explain both to an interviewer and separately to a supervisor the nature of the work offer. No arbitrary action was taken by the Department.

2. Mrs. Crow urges that the weekly claims following an initial determination of eligibility are not separate claims at all, but rather one continuous claim. Under this analysis, Mrs. Crow would maintain that the requirements of *Java* must be met, i.e., that having been declared initially eligible, she cannot be terminated at any of the periodic interviews without a prior due process hearing.

For purposes of argument, we may agree with Mrs. Crow's characterization of the weekly claims as one continuous claim. Once again, however, the Department would submit that it has complied with the mandate of *Java*. The pro-

cedures which this court in *Java* found to be "critical" were used in terminating Mrs. Crow's continuing claim. As stated above, she was told what conclusion would be made based on the evidence she herself supplied, and she was given every opportunity to rebut, controvert, or further explain the circumstances. Thus, even under this analysis, the Department cannot be said to withhold benefits "when due." There is, then, no violation of the Social Security Act, whether the weekly claims are seen as separate claims or whether they are viewed as one integrated claim.

B. JAVA AND GOLDBERG ARE DISTINGUISHABLE

In the *Java* case, the Department was required to make a determination under section 1256 of the California Unemployment Insurance Code (hereinafter referred to as "Code"). It was alleged that Mrs. Java had left her last employment without good cause and could not qualify initially for unemployment insurance. When she applied for benefits, however, the interviewer determined that she was in fact eligible. Despite this finding that Mrs. Java was eligible, the Department sought to suspend payment of benefits once an appeal from the employer had been received. It was this suspension, following a finding of initial eligibility, that this court found repugnant to the Social Security Act.

The instant situation presents a completely different factual picture. In *Java* the Code section involved was section 1256, which deals with termination from last employment. Here the Code section is section 1257, which concerns weekly claims for benefits. The latter has nothing to do with the reasons for terminating the last employment.

When the claimant applies for weekly benefits, she must show that she is eligible each week. Section 1253 is clear on this point and states:

> "An unemployed individual is eligible to receive unemployment compensation benefits with respect to *any*

> *week* only if the Director finds that: (a) a claim for benefits with respect to *that week* has been made in accordance with authorized regulations . . . . [etc.]" (Emphasis added.)

A claimant is eligible for a particular week unless one of the following occurs:

> (1) She worked for pay during the period involved (§ 1252); (2) she was not available for work (§ 1253(c)); (3) she was unable to work (§ 1253(c)); (4) she refused work (§ 1257(b)); or (5) she failed to look for work (§ 1253(e)).

The characterization of the weekly claims as separate claims was recently confirmed by the three-judge district court in *New York State Department of Labor v. Torres,* 333 F.Supp. 341 (S.D.N.Y. 1971), affirmed, ... U.S. ..... (Feb. 23, 1972). In that case, the district court, referring to a plaintiff named Dinger noted that the Department had suspended payments to him "on the basis of new factual circumstances which could not have been considered at the original eligibility interview." 333 F.Supp. at 344. It was precisely this type of information which was involved in the instant case.

Mrs. Crow has argued, however, that the claims are not really weekly claims but rather one continuous claim similar to the situation in *Goldberg,* that having been initially ruled eligible, her weekly payments thereafter cannot be terminated without a hearing. She points out that in welfare, periodic checks on eligibility are made and these are similar to the periodic checks in the unemployment insurance situation. Hence, she concludes, what was found necessary in *Goldberg* prior to termination of benefits is necessary here. We do not believe that Mrs. Crow's analogy is persua-

sive. At the time *Goldberg* was decided, the checks on a welfare claimant's eligibility were infrequent. By contrast, the claims made by Mrs. Crow were required to be presented every week.

Moreover, in the case of a welfare claimant, the claimant need only report essentially that there has been no change in circumstances. On the other hand, as the *Torres* court points out, in the unemployment insurance field, a claimant must show that he has taken certain affirmative steps, that he has looked for work, that he has not turned down suitable work, that he was available for work, etc. This often requires an investigation and analysis by the Department different from the inquiry which attends the initial claim.

Thus, in a real sense, the weekly claims here are distinct and separate claims. Each one must be separately considered. And if a decision is made that benefits are not to be "administratively allowed", no adversary-type hearing is necessary unless the claimant appeals.

The difference between the *Java* case and this one may perhaps best be illustrated by a metaphor. If we think of benefits as being contained under one roof, the finding of eligibility in *Java* permitted the claimant to enter the front door. Once inside the door, however, the claimant is required to enter through other doors to separate rooms; these are the weekly eligibility requirements. Each is a separate claim. Each involves affirmative steps which a claimant must take in order to qualify for weekly benefits. In *Java*, the interviewer had ruled initially that Mrs. Java was *eligible*. In this case, the interviewer (at the weekly interview) *denied* the claim. The ruling of this court was that it is improper to suspend payments to one already ruled eligible, but the Court did not say, and it would be illogical to assume, that a refusal to pay where the interviewer has *denied* the claim was improper.

This case is also different from *Goldberg v. Kelly*, 397 U.S. 254 U.S. (1970).

In the *Goldberg* case, a welfare claimant sought redress against action by the state in terminating welfare benefits which were paid out of general tax revenues. Unemployment insurance programs, however, operate differently from welfare programs. First, an application for unemployment insurance benefits involves not only the claimant and the state but the private employers who fund the program. The money to pay benefits does not come from general tax revenues but from an identifiable segment of the population (employers) which is required to make contributions into a reserve fund to pay benefits. Because of this method of funding the program, the state does not have the same direct interest it has in the welfare situation where every dollar the state saves may be available for other programs which compete for state funds. In the unemployment insurance area the state is basically neutral since it cannot use the unemployment insurance fund for other state purposes but must simply insure that sufficient money is available in the fund to pay eligible claimants. The state, then, may be looked upon as a fiduciary in administering the unemployment insurance fund. It has no interest in securing an "edge" over the claimant.

Second, the posture of the welfare claimant in *Goldberg* is different from that of the claimant here. In *Goldberg*, the welfare claimant was initially found eligible for benefits and was paid on a continuing basis. When some question arose concerning the claimant's possible change in circumstances, few due process safeguards were available. The caseworker made a recommendation to his supervisor, the claimant was notified in writing that the Department proposed to terminate benefits and was given only an opportunity to submit in writing, his reasons why such termination should not take effect. This court ruled that those

procedures were totally inadequate. We would submit that the procedures which were invoked by the claimant in this case satisfy due process, in contradistinction to those which were available in *Goldberg*. The California procedures are discussed in greater detail at pages 16-17, *infra*.

C. THE PROCEDURES AFFORDED MRS. CROW SATISFIED DUE PROCESS OF LAW

Due process is not a brittle concept incapable of bending to accommodate differing factual circumstances. What due process requires in one case may be wholly unsuitable to another. The concept takes on meaning only when it is considered in the context of a particular statutory framework. It is not one of fixed context unrelated to time, place and circumstance. *Cafeteria and Restaurant Workers Union v. McElroy*, 376 U.S. 886 (1961).

Due process is a rule which seeks to achieve a balance between legitimate state interests[4] and rights of individual citizens. In the *Goldberg* case the court found that the state interest did not justify the procedures employed or, in other words, that the balance was lopsided in favor of the State Welfare Department. Prior to being terminated, the claimant in *Goldberg* had no notice that his interests were being decided, had no opportunity to rebut charges against him and no opportunity for a personal appearance or meaningful presentation of evidence or arguments (397 U.S. at 259).

This case is different. In its opinion, the District Court stated, "The key, then, to recent cases is not whether the entitlement is vested but whether it is contested." 325 F. Supp. at 1319. The court then proceeded to condemn the practices of the Department in this case noting that "this

4. "State interests" may be a misnomer as applied to the instant situation since, as set forth above, the state is acting as a neutral fiduciary rather than an adverse party.

adverse finding, based on secondhand information which was ultimately proven inaccurate, deprived Mrs. Crow not only of payments for the particular week, but for nine weeks beyond that." We would take issue with the representation by the District Court concerning the source of the information which led the Department to make its adverse decision. The fact is that the Department made its initial determination as a result of information supplied by Mrs. Crow herself. This mistaken statement by the District Court is crucial because the true facts indicate that the defective procedures in *Goldberg* are simply not present in the unemployment insurance situation.

As the description of the procedure set forth below indicates, the department afforded Mrs. Crow substantial rights that were not afforded the welfare recipient in *Goldberg*. It is the department's position that due process considerations should not be construed to require the state to give Mrs. Crow a full adversary court-type hearing prior to the implementation of its determination of her disqualification.

In the instant case, Mrs. Crow certified for benefits for the week ending May 16, 1970 and submitted a form DE 4581 (Continued Claims Statement) on which were printed questions, the answers to which would indicate her eligibility or ineligibility for benefits for that week. See R. 171-173. She failed to allege eligibility since she failed to answer question No. 6 which reads, "Was any work offered you that week?"[5] Since a claimant would be disqualified from receiving benefits if he refused suitable work without good cause, Mrs. Crow failed to make a prima facie showing of eligibility by her failure to allege the absence of this disqualifying factor. Thus Mrs. Crow had

5. Mrs. Crow was totally familiar with this question as she had answered it in the negative in connection with each of her weekly claims preceding the one here in question.

created doubt as to her eligibility for that week; she was therefore referred to a determinations interviewer for a complete examination of her eligibility. At this point the determinations process described by the Supreme Court in *Java* was made available to Mrs. Crow.

In addition Mrs. Crow was afforded rights that were not described to the court in *Java*. When a claimant is disqualified and expresses dissatisfaction with the adverse decision and indicates a desire to appeal, he is immediately referred to the interviewer's supervisor. The supervisor reviews the entire case record and reinterviews the claimant the same day unless the claimant requests a delay. If the decision is in the claimant's favor, but the employer appeals, the supervisor's review is conducted within one day after the appeal is received. The supervisor analyzes the facts that have been developed by the interviewer and solicits any new facts or evidence which may be pertinent. If he finds that the facts warrant a reversal of the decision or he finds that the interviewer has incorrectly applied the law, he reverses the decision and so informs the claimant. If he finds that the decision is correct, he informs the claimant of his right to a hearing before a referee if he wishes to take his case to a higher authority. See R. 139-141.

As quoted earlier, This court held that, "It can be seen that the interview for the determination of eligibility is the critical point in the California procedure. In the department's own terms, it is 'a point at which any issue affecting the claimant's eligibility is decided and fulfills the department's legal obligation to insure that benefits are paid promptly if a claimant is eligible.'"

It is important to bear in mind the corollary of the *Java* holding. If a determination of eligibility following the procedure described in *Java* may be enforced immediately without violating the due process rights of any party as this court concluded, it necessarily follows that a deter-

mination of ineligibility following the same procedure may also be enforced without violating the due process rights of either party. It would be grossly inconsistent to maintain that the interview procedure is reliable when the result is favorable to the claimant but that it is unreliable when the claim is denied.

In *Goldberg v. Kelly*, this court went beyond the holding that an "adequate hearing" was necessary before welfare benefits could be terminated and provided guidelines as to what an "adequate hearing" entails in the welfare context. The court said that the hearing need not take the form of a judicial or quasi-judicial trial but has the sole function of protecting the recipient against an erroneous termination of its benefits. The court went on to describe the elements which must be present in the welfare context:

1. The opportunity to be heard at a meaningful time and in a meaningful manner.

2. The right to notice and time to prepare a defense.

3. The right to appear personally with or without counsel before the official who determines eligibility.

4. The right to a review of a disqualification by an independent decision-maker.

5. The right to confront and cross-examine adverse witnesses.

It is clear that the procedure described above affords the claimant four of the five safeguards enumerated in *Goldberg*, namely:

1. The department affords the claimant the opportunity to be heard at a meaningful time and place. The claimant is examined by a determinations interviewer and the facts surrounding the claimant's eligibility are elicited. In the case of Mrs. Crow, it was her testimony that gave rise to the disqualification in the first place. The interviewer has

an obligation to seek out the claimant's point of view at the earliest stages of the investigation. The claimant is generally heard orally by the decision-maker, but may submit a written statement or other documentary evidence—for example, a physician's statement. Additionally, the claimant is invited to suggest witnesses to support his point of view. The claimant does not have the burden of producing the witnesses since the interviewer has the obligation of gathering evidence.

2. The claimant is placed on notice that his eligibility is in doubt as soon as disqualifying information comes into the possession of the department. In fact, as in the case of Mrs. Crow, it is most often the claimant who produces such disqualifying information. While both the claimant and the department require a speedy determination on the claimant's ineligibility, the decision may be postponed if the claimant desires more time or if the interviewer deems it necessary to acquire additional information which is not readily available.

3. Obviously, the claimant has a right to appear personally. Indeed, in most cases, the claimant has the obligation of appearing personally. Any claimant who desires to appear either with legal counsel or lay representation (for example, a union representative) is afforded that opportunity either at the preliminary determination or the "pre-appeal review" or on both such occasions.

4. As described above, an aggrieved claimant will receive a "pre-appeal review" by a supervisor who will interview the claimant, examine the record, obtain additional facts when necessary, and examine the application of the law to the facts as developed and documented. In many cases the pre-appeal review is conducted by the office manager; in other cases it is conducted by the supervisor of the interviewer who made the initial disqualification.

5. Appellees' most emphatic objection to current procedures appears to be the failure of the Department to afford a claimant the right to confront and cross-examine adverse witnesses, at least as that element of due process is conventionally defined. In other words, the claimant, so goes the argument, should have a right to physically confront and cross-examine adverse witnesses and no substitute procedure is adequate to satisfy due process. This approach is simplistic and ignores the practicalities of administering the program. The fact is that the Department never decides a case without giving the claimant a full opportunity to not only air his own views concerning relevant facts but also to rebut and controvert any conflicting views offered by other persons. Little is gained by slavishing adhering to labels such as "cross-examination" or "right to confrontation". The point is not whether one individual is physically present to confront another individual. The real object is to make sure that the decider of facts has enough information from both sides to make a fair decision. It is submitted that the current procedures satisfy this principle.

Indeed, we might legitimately ask what value the right of cross-examination and confrontation would have in cases of this type in any event. When a claimant reports that he turned down an offer of work, who is there to cross-examine? The party who offered the job has no interest in attending the proceedings. He has nothing to gain or lose by the proceedings. His reserve account is not charged and he is totally unaffected by the decision of eligibility.

Whether necessary or not, the fact is that current procedures permit a claimant to have the equivalent of cross-examination. The procedure followed was summarized by Phil Proto, Administrator of the Unemployment Insurance Program:

"The interviewer is required to permit the claimant to explain the circumstances surrounding the issue of his eligibility. Notes are recorded on a Record of Interview as to what the employer has alleged. He is then given an opportunity to offer any statement he wishes in rebuttal. The interviewer asks specific questions to bring out all the facts. If the claimant's version does not agree with the employer's allegations, the employer is told what the claimant has said and given an opportunity to submit a rebuttal. In most cases contact with the employer is by telephone. In some instances he is written a letter and the decision is held up pending a reply. In most cases the decision is arrived at during the interview.

"Verification, when required, is obtained from any source such as labor unions, doctors, transportation companies, etc. If the claimant's statement and the employer's statement are at variance, both the claimant and the employer are permitted to produce or suggest witnesses who can testify to what is alleged. When the evidence is equal and contradictions cannot be resolved, the claimant is given the benefit of the doubt." R. 140:10-29.

A number of conclusions may be made from Mr. Proto's description of the procedures. First, it is apparent that if the procedures favor any party at all they lean in favor of the claimant. It is the claimant not the employer who is physically present at the interview. He can bring with him witnesses, an attorney and documentation. Moreover, when the interviewer telephones the employer, the claimant is right there to rebut in person the employer's version of the relevant circumstances. It is, in short, the claimant who has the last word and whose version is often contradicted.

The Department's position then, is that not every case demands physical cross-examination. Not every case demands

identical procedures to satisfy due process imperatives. See *Richardson v. Wright,* ..... U.S. ....., 92 S.Ct. 788, 31 L.Ed.2d 151 (1972); *Dixon v. Alabama State Board of Education,* 294 F.2d 150 (5th Cir. 1961); *Richardson v. Perales,* 402 U.S. 389, 406-407 (1971); and *FCC v. WJR,* 337 U.S. 265 (1948). See particularly *Rivas v. Cozens,* 327 F.Supp. 867 (N.D.Cal. 1971), pending before this court, No. 71-5780, where a three-judge district panel ruled that a driver's license may be suspended without a prior hearing. The court in the latter case specifically distinguished *Sniadach,*[6] *Goldberg,* and *Java.* Cf. *Freeman v. Gould Special School District,* 405 F.2d 1153 (8th Cir. 1969); *Ahern v. Board of Education,* 327 F.Supp. 1391 (D.Neb. 1971).

CONCLUSION

For the reasons stated, it is respectfully urged that this court grant the Petition and issue a writ of certiorari.

Respectfully submitted,

EVELLE J. YOUNGER
Attorney General

ASHER RUBIN
Deputy Attorney General
Attorneys for Appellants

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6. *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969).

(Appendices Follow)

Appendix A

ELLENMAE CROW et al., *Plaintiffs*,

v.

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES et al.,

Defendants.

No. C-70 1128.

United States District Court,
N. D. California.

Oct. 12, 1970.

Stephen P. Berzon, Contra Costa Legal Services Foundation, Richmond, Cal., Randlett W. Schubach, Santa Cruz, Cal., for plaintiffs.

Thomas C. Lynch, Atty. Gen. of Cal., James L. Browning, Jr., U. S. Atty., William Spohn, San Francisco, Cal., Robert N. Ford, Civil Division, Dept. of Justice, Washington, D. C., for defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Wollenberg, District Judge.

This case follows in the wake of Java, et al. v. California Department, etc., et al., 317 F.Supp. 875 (N.D.Calif., 1970). Java held that Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), which mandates a due process "fair hearing" prior to termination of welfare benefits, applies equally well to the unemployment compensation field, and that the ends of the Social Security Act, as well as of the Constitution, are best served when persons who have once been found eligible for benefits continue to receive such benefits during the pendency of appeal actions initiated by former employers.

The instant case does not involve an employer's appeal of an initial determination of eligibility. Rather, the Court must pass upon a termination of benefits, without prior hearing, following a finding that the recipient has "without good cause, refused to accept suitable employment when offered to him". Calif.Unempl.Ins.Cde. § 1257(b). Such a determination renders the recipient "ineligible to receive unemployment compensation benefits for not less than two nor more than ten consecutive weeks beginning with the week in which the cause of • • • disqualification occurs." Calif.Unempl.Ins.Cde. § 1260(b). The plaintiff in the instant case, found to have "precluded an offer of suitable work", was declared ineligible for the full ten week period specified by § 1260(b).

Though a determination that a recipient has "refused to accept suitable employment" would, in most instances, seem pre-eminently factual, it is made without the recipient being given advance notice that the issue has been raised, or the right to confront and cross-examine those persons whose testimony may prove decisive. It is this failure to provide what are alleged to be the requisites of a "due process 'fair hearing'" that is said to run counter to *Goldberg* and *Java*, cit. *supra*.[1]

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1. None of the parties herein moved for a three-judge Court, and the Court did not ask for one on its own motion. It was felt that the issues raised herein had been thoroughly aired, and resolved, by Goldberg v. Kelly, and Java v. Calif. Dep't of Human Resources, cit. *supra*. Turner v. City of Memphis, 369 U.S. 350, 82 S.Ct. 806, 7 L.Ed.2d 762 (1962). Likewise the prayer herein was not to enjoin, on grounds of unconstitutionality, the execution of §§ 1257(b) and 1260(b), but was rather to enjoin the interpretation of these statutes in a manner inconsistent with *Goldberg* and *Java*. Benoit v. Gardner, 351 F.2d 846 (1 Cir., 1965). This Court is aware that had it become apparent that the instant case presented issues in any significant way different from those discussed in previous cases, or if claims for relief had been broadened, a three-judge court might well have been necessary under 28 U.S.C. § 2281.

Certain procedural questions must be resolved before the Court reaches the merits herein. First, it is said that the case is moot, in that the named plaintiff, Mrs. Crow, has had benefits reinstated. The Court finds that while the incident which gave rise to the controversy herein has been resolved, the underlying problem remains. The Department continues to interpret the cited sections so as to stop payments to recipients who have no right to a pre-termination fair hearing. This allegedly arbitrary procedure continues to threaten members of plaintiff's class. See Kelly v. Wyman, 294 F.Supp. 893, 908 (D.C. 1968); Singleton v. Board of Com'rs., etc., 356 F.2d 771 (5 Cir., 1966).

Related to the asserted mootness of the controversy is the motion of one Eldon Lee Allison to intervene as named plaintiff. The motion will be denied. As noted above, the need of another named plaintiff to keep alive Mrs. Crow's case is at best arguable, and in addition, Allison's affidavit indicates additional issues which would unduly complicate those presented in Mrs. Crow's complaint.

Finally, the State and federal defendants contest the propriety of this suit as a class action under Rule 23. The Court notes that a great many of the recent cases presenting issues similar to this one have been class actions, as would seem appropriate: under challenge are state-wide procedures uniformly applicable to large numbers of persons no one of whom has such a financial state as would justify the prosecution of an individual action. Kelly v. Wyman, cit. *supra*, 294 F.Supp. at 908; Wheeler v. Montgomery, 296 F.Supp. 138 (D.C.1968), rev'd on other grounds 397 U.S. 280, 90 S.Ct. 1026, 25 L.Ed.2d 307 (1970); Johnson v. Robinson, 296 F.Supp. 1165 (D.C.1967). See also 28 U.S.C.A. Rule 23, Notes of Advisory Committee on Rules [note to Rule 23(b) (1) (A)]. In light of these precedents, the Court finds this a proper class action under Rule 23 of the Federal Rules of Civil Procedure.

The Court thus moves to the merits. After hearing extensive oral argument, receiving exhaustive legal memoranda, and having taken under submission cross motions for summary judgment, it is this Court's decision that the arguments presented by the defendants were, without exception, made to and rejected by the judges in *Goldberg* and *Java*, cit. *supra*, and that plaintiffs are accordingly entitled to summary judgment.

The arguments against relief, considered in reverse order of importance, are the following: (1) unemployment insurance programs, and the practices here challenged, are nationwide, and the Court should avoid tinkering with questions of such broad import; (2) the public purse will be unduly threatened if the procedure urged by plaintiff is adopted; (3) the *Goldberg* rationale should be confined to welfare and has no application to unemployment compensation programs; (4) even if applicable to unemployment compensation, the *Goldberg* reasoning should not be applied to the case of Mrs. Crow.

(1) Unemployment insurance, like public assistance, is administered by the individual States within a federal statutory framework. Both programs involve grants made to the States which have established programs of aid to unemployed and/or needy persons, which programs have been certified by relevant officials as meeting the standards set by federal statutes and regulations. A challenge to any part of this national program will have repercussions elsewhere, but it would belabor the obvious to cite the decisions which have been rendered in these areas by Courts undeterred by fears that any lead provided by them might be followed in other jurisdictions. To be further noted is that any decision with regard to California's procedures will *not* be automatically applicable to other States. The demands of procedural due process must always be inter-

preted in light of particular systems and situations; a decision as to one such system will not be automatically applied elsewhere in the same way as were decisions based on substantive due process, e.g., Serbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); and Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969).

(2) The public purse has been repeatedly invoked in cases prior to this one. This Court will only echo its predecessors: fiscal considerations are always relevant, but are seldom if ever decisive in cases of this sort. "Against the justified desire to protect public funds must be weighed the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance." Kelly v. Wyman, cit. *supra*, 294 F.Supp. at 901, cited with approval by Goldberg v. Kelly, cit. *supra*, 397 U.S. at 261, 90 S.Ct. 1011. There are ways by which the State can protect itself, even in the welfare situation where recipients are often judgment proof, from undue dissipation of its funds. Hearings may be accelerated, and additional personnel employed. Furthermore, there are recoupment measures available which have been found constitutional. Goldberg v. Kelly, cit. *supra*, 397 U.S. at 266, 90 S.Ct. 1011; Snell v. Wyman, 281 F.Supp. 853 (D.C.1968), aff'd 393 U.S. 323, 89 S.Ct. 553, 21 L.Ed.2d 511 (1969). Most pertinent in this context are Calif. Unempl.Ins.Cde. §§ 1375-1380 (liability for overpayments) and the penalty provisions of § 1260(b) itself, which mean that if, after a fair hearing, an individual is found to have refused suitable employment in a given week, he may forfeit his right to payments not only for that week but for as many as nine succeeding weeks. It is difficult to see how, with the latter provision, the State would be out of pocket even if cut-off under § 1257(b) is delayed somewhat to allow confrontation and cross-examination.

(3) The government's contention that the due process considerations held decisive in *Goldberg* should be confined to welfare situations has been disposed of by *Java,* cit. *supra.* The State argued in *Java,* as the federal government argues here, that the controlling factor in *Goldberg* was the "brutal need" which characterizes the case of the typical welfare recipient.

Reference is made to plaintiff Crow's financial situation, to the fact that she is married to an employed individual, and to the family's ownership of two (very used) automobiles. Defendants conclude with the argument that since Mrs. Crow does not lack "the very means to live" she is not entitled to "the extraordinary remedy of a predetermination hearing • • •."

Defendants misread *Java, Goldberg,* relevant California statutes, and the recent history of American jurisprudence. The right to confront and cross-examine adverse witnesses, where an important decision hinges on a question of fact, is *not* an "extraordinary remedy". It has been found by the Supreme Court to be constitutionally mandated "in almost every setting". Goldberg v. Kelly, cit. *supra,* 397 U.S. at 269, 90 S.Ct. 1011. It is *welfare,* not unemployment compensation, or government employment, or garnishment proceedings, which was for the longest time deemed outside the protections of the due process clause. The Supreme Court invoked the "brutal need" of the welfare client, not to give him special rights not enjoyed by others, but as part of the balancing process which had been employed in previous due process cases, e. g. Sniadach v. Family Finance Corp., 395 U.S. 337, 341-342, 89 S.Ct. 1820, 1822-1823, 23 L.Ed.2d 349 (1969) ("prejudgment garnishment • • may • • • drive a wage-earning family to the wall"), and Greene v. McElroy, 360 U.S. 474, 508, 79 S.Ct. 1400, 1419, 3 L.Ed.2d 1377 (1959) ("petitioner's work opportunities have been severely

limited * * *"). It would be anomalous indeed if the Supreme Court's extension of procedural guarantees to welfare eligibility determinations was used to justify a restriction of similar rights previously recognized in other areas.

(4) The Court now moves, perhaps cumbrously, to the *ad hoc* balancing process utilized in recent cases of this sort. "[One's] constitutional right to procedural due process entitles him to a quality of hearing at least minimally proportioned to the gravity of what he otherwise stands to lose through administrative fiat." Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv.L.Rev. 1439, 1452 (1968). While engaging in this comparison of interests, we repeat that it is clear that a pre-determination hearing, with the right to confront and question witnesses *is the constitutional norm, and not the exception*, as defendants would imply, *when "government action seriously injures an individual"*, and where the crucial decision is based upon facts alleged by a third party. Greene v. McElroy, cit. *supra* at 496, 79 S.Ct. at 1413.

It cannot be doubted that plaintiff herein has shown "serious injury" from the government procedures complained of. She is a member of a class for which both courts and legislature have found unemployment compensation a necessary last-ditch safeguard against being thrust upon public charity. See Java v. California Dep't, etc., cit. *supra* 317 F.Supp. at 878; Calif. Portland Cement Co. v. Calif. Unempl. Ins. Appeals Bd., 178 Cal.App.2d 263, 3 Cal.Rptr. 37 (1960); Calif.Unempl.Ins.Cde. §§ 100, 101. She was found initially eligible for benefits, had begun receiving said benefits, but was cut off from them upon receipt by the Department of third party information which, in the Department's opinion, justified a finding that she had refused suitable employment. The injury to her was compounded

when the Department informed her that she would be subject to the maximum "penalty period" imposed by § 1260(b).

The fact that Mrs. Crow was vindicated on appeal and won refund of wrongly withheld benefits does not affect the gravity of the harm caused her. On the contrary, the Court notes that the median six week period required before witnesses are cross-examined on appeal, and the thirty-two per cent of appellants who wait during that time and then are found worthy of relief, together make this case indistinguishably close to *Goldberg*.[2]

The defendants have attempted to differentiate Mrs. Crow's case from others cited above on the ground that while the plaintiffs in *Java, Sniadach,* etc. could point to takings of property or entitlements clearly theirs, Mrs. Crow was never really eligible for benefits for the week here concerned. Under California's system, eligibility is dependent not only on an initial finding of qualification such as was involved in *Java*, but on independent, weekly findings of continued "availability" for employment. Calif.Unempl.Ins. Cde. §§ 1253(c), 1257(b).

This theory is redolent of older vested rights concepts which still enjoy considerable life in the law of due process. If a person can point to personal possessions, or wages, or

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2. "[We note] the startling statistic that post-termination fair hearings apparently override prior decisions to terminate benefits in a substantial number of cases. * * * in the fair hearings on discontinuance which reached decision from April through August of this year, only 50 of 78 cases, or 64%, were affirmed." Kelly v. Wyman, cit. *supra*, 294 F.Supp. at 901 (text and accompanying note).

"Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens." Goldberg v. Kelly, cit. *supra*, 397 U.S. at 266, 90 S.Ct. at 1019.

a position of public employment, that are clearly his, he is in a better position to argue procedural rights if an attempt is made to take that "property" without a prior hearing. Sniadach v. Family Finance, etc., cit. *supra;* Slochower v. Bd. of Higher Educ., etc., 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956); Klim v. Jones, 315 F.Supp. 109 (N.D. Calif. 1970). But however useful they may be in some cases, these concepts become burdensome in others. Welfare and unemployment compensation schemes both involve an initial decision *re* general eligibility, followed by periodic determinations that the applicant's circumstances have not changed in such a way as to affect that first decision. It is most difficult to say at any point in the proceeding whether the recipient's right to further payments is "vested" or not, and the Court in *Goldberg* made no such distinction.[3]

The key, then, to recent cases is not whether the entitlement is vested but whether it is contested. When an individual is deprived of a statutory benefit which he has previously enjoyed due to an adverse finding where factual issues are in dispute, and where the agency concerned has

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3. It might be appropriate to compare the case histories of the plaintiffs in Kelly v. Wyman, cit. *supra*, with that of plaintiff herein. In *Kelly*, Mrs. Angela Velez, a welfare recipient, was terminated after her landlady reported visits to the Velez home by Mrs. Velez' husband. The post-termination hearing found the information to have been false, and benefits wrongfully terminated. Another plaintiff was terminated following an agency finding, without a "fair hearing", that she had been working for the local Board of Education while receiving benefits. Plaintiff herein, Mrs. Ellenmae Crow, was receiving benefits, but was terminated when her Department interviewer told her he had spoken with a Mr. Spray, of Goodwill Industries, who had told him that Mrs. Crow had turned down a job offer. Mrs. Crow vigorously contested that an offer had been made, but nonetheless had to await appeal procedures before being able to present the results of her own direct questioning of Mr. Spray.

It seems clear that in all three cases, recipients previously found eligible, who had begun to receive benefits, were terminated without prior "fair hearings" on the basis of contested, third party information regarding conduct subsequent to the initial determination of eligibility.

acted upon third party information, the ancient and "relatively immutable" jurisprudence of *Greene, Sniadach,* and *Goldberg* comes into play. It is in a case such as Mrs. Crow's, where the claimant said she was offered no job, and where the interviewer disagreed, saying he had learned she refused employment, that confrontation and cross-examination are necessary.[4] This adverse finding, based on secondhand information which was ultimately proven inaccurate, deprived Mrs. Crow not only of payments for the particular week, but for nine weeks beyond that. Especially in light of this § 1260(b) "penalty", impact of the finding cannot be confined to that week in which it was rendered; its real effect was to reverse, without a fair hearing, the initial determination of eligibility. *Goldberg* and *Java* are clearly in point, and will be applied by this Court.

Accordingly, IT IS HEREBY ORDERED that the State defendants herein, their successors in office, agents and employees, are permanently enjoined from enforcing Calif. Unempl.Ins.Cde. §§ 1257(b) and 1260(b) in such a way as to result in termination, prior to a hearing consonant with the principles of Goldberg v. Kelly, cit. *supra,* of unemployment compensation benefits due persons who have timely contested factual allegations brought under the aforementioned statutes.

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4. The Court must emphasize what it is *not* deciding in the instant case. It is *not* deciding what procedures are necessary when the only dispute is as to the application of statutes or regulations to uncontested facts. See *Goldberg,* 397 U.S. at 268, footnote 15, 90 S.Ct. 1011, 25 L.Ed.2d 287. Nor is it treating of factual problems "of general or common application" to an entire class of recipients, e. g., the trade dispute situation dealt with by Calif. UnemploymentIns.Cde. § 1262.5. Finally, the Court expresses no opinion of procedures where relevant facts are ascertainable by reference to "objectively determinable data, e. g. medical reports, and where ample time and resources are available to all parties for gathering such data. See Messer v. Finch, 314 F.Supp. 511 (E.D.Ky., 1970). See also Kelly v. Wyman, cit. *supra,* 294 F.Supp. at 905.

Execution of this Order will be stayed ten (10) days from the date of its filing. Any further stay will be granted only upon a proper motion and showing by defendants.

Appendix B

§ 503. State Laws, Provisions Required; Stopping Payments on Failure to Comply With Law

(a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—

(1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; and

(2) Payment of unemployment compensation solely through public employment offices or such other agencies as the Secretary of Labor may approve; and

(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; and

(4) The payment of all money received in the unemployment fund of such State (except for refunds of sums erroneously paid into such fund and except for refunds paid in accordance with the provisions of section 1606(b) of Title 26), immediately upon such receipt, to the Secretary of the Treasury to the credit of the employment trust fund established by section 1104 of this title; and

(5) Expenditure of all money withdrawn from an unemployment fund of such State, in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 1606(b) of Title 26; *Provided,* That an amount equal to the amount of em-

ployee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration: *Provided further*, That the amounts specified by section 1103(c) (2) of this title may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices; and

(6) The making of such reports, in such form and containing such information, as the Secretary of Labor may from time to time require, and compliance with such provisions as the Secretary of Labor may from time to time find necessary to assure the correctness and verification of such reports; and

(7) Making available upon request to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation and employment status of each recipient of unemployment compensation, and a statement of such recipient's rights to further compensation under such law; and

(8) Effective July 1, 1941, the expenditure of all moneys received pursuant to section 502 of this title solely for the purposes and in the amounts found necessary by the Secretary of Labor for the proper and efficient administration of such State law; and

(9) Effective July 1, 1941, the replacement, within a reasonable time, of any moneys received pursuant to section 502 of this title, which, because of any action or contingency, have been lost or have been expended for purposes other than, or in amounts in excess of, those found necessary by the Secretary of Labor for the proper administration of such State law.

(b) Whenever the Secretary of Labor, after reasonable notice and opportuniy for hearing to the State agency charged with the administration of the State law, finds that in the administration of the law there is—

(1) a denial, in a substantial number of cases, of unemployment compensation to individuals entitled thereto under such law; or

(2) a failure to comply substantially with any provision specified in subsection (a) of this section;

the Secretary of Labor shall notify such State agency that further payments will not be made to the State until the Secretary of Labor is satisfied that there is no longer any such denial or failure to comply. Until he is so satisfied he shall make no further certification to the Secretary of the Treasury with respect to such State: *Provided*, That there shall be no finding under clause (1) until the question of entitlement shall have been decided by the highest judicial authority given jurisdiction under such State law: *Provided further*, That any costs may be paid with respect to any claimant by a State and included as costs of administration of its law.

(c) The Secretary of Labor shall make no certification for payment to any State if he finds, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law—

(1) That such State does not make its records available to the Railroad Retirement Board, and furnish to the Railroad Retirement Board at the expense of the Railroad Retirement Board such copies thereof as the Railroad Retirement Board deems necessary for its purposes; or

(2) That such State is failing to afford reasonable cooperation with every agency of the United States charged with the administration of any unemployment insurance law.

Aug. 14, 1935, c. 531, Title III, § 303, 49 Stat. 626; June 25, 1938, c. 680, § 13(g), 52 Stat. 1112; June 20, 1939, c. 227, § 18, 53 Stat. 848; Aug. 10, 1939, c. 666, Title III, § 302, 53 Stat. 1378; 1946 Reorg.Plan No. 2, § 4, eff. July 16, 1946, 11 F.R.

7873, 60 Stat. 1095; Aug. 10, 1946, c. 951, Title IV, § 416(c), 60 Stat. 991; 1949 Reorg.Plan No. 2, § 1, eff. Aug. 20, 1949, 14 F.R. 5225, 63 Stat. 1065; Aug. 28, 1950, c. 809, Title IV, § 405(b), 64 Stat. 560; Aug. 5, 1954, c. 657, § 5(a) (1), 68 Stat. 673.

Appendix C

In the Supreme Court of the United States

_____ Term ____

No. _____

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,

Appellants,

v.

ELLENMAE CROW, individually, and on behalf of herself and all others similarly situated,

Appellees,

MOTION TO EXPEDITE CONSIDERATION OF PETITION FOR CERTIORARI OR FOR CONSOLIDATION OR FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

..... Term .....

No. .....

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,

Appellants,

v.

ELLENMAE CROW, individually, and on behalf of herself and all others similarly situated,

Appellees,

MOTION TO EXPEDITE CONSIDERATION OF PETITION FOR CERTIORARI OR FOR CONSOLIDATION OR FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Petitioner is in the precarious position of possibly losing a case involving well over $50 million per year without this court having reviewed the matter on the merits. The complaint in this case was filed on May 28, 1970. The matter was extensively briefed and argued in the United States District Court, Northern District, California. Lengthy briefs have also been filed in the Ninth Circuit Court of Appeals. Careful attention has been given at all stages to presenting a full and complete record to the courts. In the ordinary course, petitioner would anticipate that the matter would be decided by the appellate court from which review, if necessary, could be sought in the Supreme Court.

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1. The Department filed two briefs, totalling 52 pages, Mrs. Crow's brief was 64 pages, and the United States, also a party, filed two briefs totalling 37 pages. A seven-page amicus curiae brief was also filed by the California Labor Federation, AFL-CIO.

Because of recent events, of which petitioner has only now become aware, there is a danger that petitioner's effort to have this case considered on the merits will be frustrated. The identical issue presented here was considered by a three-judge federal district court in Indiana in the case of *Burney v. Indiana Employment Security Divison, et al.*, Civ. No. 70 F 122 (N.D. Ind. 1971). Like the single judge in this case, the three-judge panel in *Burney* invalidated certain State procedures relating to unemployment insurance benefits. The procedures struck down in Indiana are virtually identical to those employed in California. On March 2, 1972, the State of Indiana appealed to the United States Supreme Court, No. 71 1119.

The fact that this court will consider the Indiana appeal before the Ninth Circuit has considered the instant case raises several problems for petitioner.

(1) We have been informed by the Indiana Attorney General's Office that the record in the *Burney* case is sparse and incomplete, that the matter was handled by four or five attorneys and that there is some question whether the legal issues were fully and fairly presented to the federal panel.

(2) We have also been informed by the Indiana Attorney General's Office that Mrs. Burney is now represented by Stephen P. Berzon who, coincidentally, is also counsel for Mrs. Crow in the instant matter. It is apparent that Mr. Berzon is attempting to obtain a favorable ruling from this court in *Burney* so as to bind the Ninth Circuit in *Crow* and preclude a consideration of the merits in the latter case.[2] We attribute no impropriety to Mr. Berzon or

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2. The State of Indiana has supplied us with a copy of Mr. Berzon's Motion to Affirm in *Burney*. Most of the language in that document has been copied verbatim from the brief he filed in the Ninth Circuit in the instant case.

his associates, but we believe that fairness would dictate that this court grant certiorari in this case. Review by this court will mean that the important issue presented can be considered in the context of a case which, unlike *Burney*, has been prepared with considerable attention to presenting a full record and to developing the legal issues involved.

We would, therefore, respectfully urge the court to take any one of the following steps:

(1) Grant the instant Petition and defer further consideration of *Burney* until such time as this case has been fully briefed; or

(2) Grant the instant Petition and consolidate this case with *Burney*; or

(3) Defer consideration of *Burney*, and grant Petitioner leave to file a brief as amicus curiae.

From the petitioner's point of view, the third alternative is the least desirable. We believe that if law is to be made on the issues raised, it should be done on the basis of a more complete record than that presented in *Burney*.

Dated: April 28, 1972

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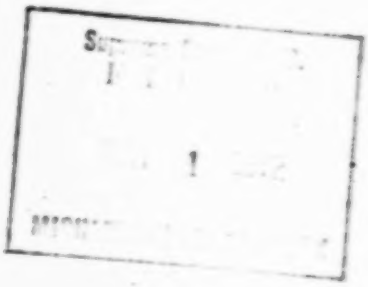
SUPREME COURT, U. S.

In the Supreme Court of the United States



October Term, 1971

No. 71-1443

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Petitioner,

vs.

ELLENMAE CROW, et al.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Memorandum Opposing Certiorari

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A writ of certiorari to review a case pending in a court of appeals, prior to a decision by such court, "will be granted only upon a showing that the case is of such imperative importance to justify the deviation from normal appellate procedures and to require immediate settlement in this court." S.Ct. Rule 20. The California Department of Human Resources Development (hereinafter "the Department") asserts that this is an appropriate case for review before decision by the court of appeals because unless certiorari is granted, "[p]etitioner is in the precarious position of possibly losing a case involving well over

$50 million per year without this court having reviewed the matter on the merits." (Petition App. C at 17). This assertion is both factually inaccurate and ignores the limited scope of review exercised by this Court pursuant to Rule 20.

The Department's contention that this litigation involves tens of millions of dollars per year is wholly fanciful.[1] In arriving at its estimates, the Department incorrectly assumes: (1) that all recipients whose benefit payments are suspended or terminated will request an evidentiary hearing, regardless of whether they have returned to work, died, agree with the Department's decision, or for other reasons do not contest the Department's action; (2) that all recipients who request hearings will lose them, despite the fact that recipients presently win over one-third of all hearings; (3) that even if a termination is not based on disputed facts or legal questions, an unemployment compensation recipient who requests an evidentiary hearing would have to be paid benefits pending the hearing;[2] (4) that all benefits improperly paid pending a hearing will be unrecoverable, despite the fact that the Department presently recovers approximately 65% of all benefit overpayments, *California Department of Human Resources Development* v. *Java*, 402 U.S.

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[1]In California Department of Human Resources Development v. Java, 402 U.S. 121 (1971), the Department asserted that an adverse decision would cost California $18 million per year. Cal. Br. at 16, n. 10. However, the accurate figure was $335,836. Appellees' Br. at 47-48.

[2]The district court's order requires a hearing only for "persons who have timely contested factual allegations." Petition App. A at 10.

121, 129 n. 8 (1971); and (5) that the Department can do nothing to shorten the inordinately long time it takes before holding administrative hearings.

Normal appellate procedures are more than adequate to protect the Department's interests in this case. Should this Court note jurisdiction in *Indiana Employment Security Division* v. *Burney*, No. 71-1119, the Department as *amicus curiae* can inform the Court of its view of the law and of any significant factual considerations which may affect California.[3] There is nothing whatsoever to indicate that the Court of Appeals for the Ninth Circuit is incapable of deciding this case in a proper and orderly manner.

In light of this Court's burgeoning docket[4] and the frequency with which cases presenting similar questions are filed in the lower courts,[5] this Court of necessity has taken an increasingly restrictive view of its discretion to grant certiorari prior to a decision by a court of appeals. This extraordinary procedure has in recent years been implemented in such unusual circum-

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[3]The Department need not obtain consent of the parties or leave of the Court prior to filing an amicus brief on the merits. S. Ct. Rule 42(4).

[4]In the 1970 Term, the Court considered approximately 3318 cases, but disposed of only 141 by written opinions. *See* Note, *The Supreme Court: 1970 Term*, 85 HARV. L. REV. 3, 346 (1971).

[5]When this Court in Richardson v. Wright, 405 U.S. 208, *rehearing denied*, ... U.S. ....., 40 L.W. 3470 (1972) considered the question of whether a prior hearing was required in terminating Social Security disability benefits, there were then seventeen lower court cases pending in which the same issue was presented. *See* Richardson v. Wright, supra, 405 U.S. at 212-213, n. 1 (Brennan, J.) (dissenting opinion). Should the Court adopt a practice of granting review of cases pending in lower courts whenever the identical issue is being considered by this Court, its docket would soon be overwhelmed.

stances as where an immediate emergency exists[6] or where separate cases have interrelated facts and parties[7] or where profound and novel constitutional questions are raised.[8] While important, the present case does not rise to these dimensions. By-passing the normal appellate process hence is unnecessary to achieve an orderly and complete consideration of the issues raised.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Dated: May 30, 1972.

Respectfully submitted,

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[6] *See* United States v. Thomas, 361 U.S. 950 (1960); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[7] *See* New Haven Inclusion Cases, 399 U.S. 392 (1970); McCulloch v. Sociedad Nacional, 372 U.S. 10, 12 (1963); Hannah v. Slawson, 363 U.S. 420 (1960).

[8] *See* McElroy v. Guagliardo, 361 U.S. 281, 283 (1960); Brown v. Board of Education, 344 U.S. 1, 3 (1954); *but cf.* Taylor v. McElroy, 358 U.S. 918 (1958).